United Nations A/CN.9/SR.739

General Assembly

Distr.: General
17 July 2002

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 739th meeting
Held at Headquarters, New York, on Monday, 17 June 2002, at 10 a.m.

Temporary Chairman: Mr. Hans Corell (Under-Secretary-General for Legal Affairs, the Legal Counsel)
Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Opening of the session

Election of officers

Adoption of the agenda

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation

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Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43082 (E)

The meeting was called to order at 10.30 a.m.

Opening of the session

1. **The Temporary Chairman** invited the members of the Commission to look at their work during the thirty-fifth session from the broader perspective of the social development goals of the United Nations, including those set forth in the Millennium Declaration. Economic growth, political modernization, the protection of human rights and other larger objectives of the United Nations all hinged, at least in part, on "the rule of law", and hence policy makers in developing and transition countries were seeking ways to establish or strengthen the rule of law in their countries. Measures to fight corruption, adopt market-oriented policies and spend more on the needs of the poor were all the more important as globalization advanced and the United Nations searched for solutions to advance sustainable economic growth.

2. The Commission had made a significant contribution to facilitating a number of economic activities that formed the basis of an orderly functioning open economy, thus helping developing countries to fully participate in the benefits of the global marketplace. The economic development that resulted from countries' modernizing and harmonizing their trade laws paid direct dividends to all segments of a developing country's population.

3. The use of electronic commerce, for instance, had become indispensable to developing countries to reduce transaction costs and facilitate penetration in new markets. Electronic commerce could not prosper, however, without the adaptation of national and international laws that had been largely written against the background of paper-based commercial communications. Such adaptation of laws should be based on harmonized and balanced standards such as the UNCITRAL Model Law on Electronic Commerce.

4. Another crucial need was to enhance the conditions under which business entities in developing countries could gain access to credit. Financing to creditworthy enterprises was often not available at commercially affordable terms because many national laws had not been updated. The solution was to prepare internationally harmonized models for such laws that took into account the legitimate interests of creditors and debtors, variations in economic circumstances and different legal traditions, a task being carried out through the UNCITRAL Working Group on Security Interests.

5. The importance of public-private partnerships for achieving sustainable development in the provision of basic public infrastructure had been stressed in the Programme for the Further Implementation of Agenda 21, adopted by the General Assembly in 1997. An essential component of an enabling national environment for such partnerships was a legislative framework that promoted private participation in infrastructure, while taking into account the public interest concerns of the host country. Those were two of the main objectives of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects.

6. One of the most significant barriers to transparent and accountable governance, another pillar of people-centred sustainable development, was the failure to stem corruption. Recent experience in law reform showed that national action plans to combat corruption included revisions of outdated domestic procurement laws and regulations to ensure that they met international standards of good practice in procurement. Perhaps the most widely recognized set of such standards was the UNCITRAL Model Law on Procurement of Goods, Construction and Services. Savings achieved through a modern and transparent procurement system made it possible for Governments in developing countries to reallocate resources to attend pressing social needs.

7. Progressive harmonization and unification of law was an incomplete process, however, without the implementation of international conventions and model laws by States and the fostering of public awareness of those texts. International governmental and non-governmental organizations had joined in the Commission's efforts to carry out such promotional activities. Nonetheless, the success of harmonization efforts depended on ensuring a high level of coordination between all the agencies involved, a function which reflected a fundamental element of the UNCITRAL mandate that could not be delegated to other organizations.

8. The performance of the legal affairs programme of the United Nations had recently been re-evaluated by the Office of Internal Oversight Services (OIOS), and the Secretary-General had transmitted a report thereon to the Committee for Programme and

Coordination for consideration at its forty-second session (E/AC.51/2002/5). Although the overall assessment of the activities had been highly positive, the OIOS survey had identified three areas for improvement. First, there was a need to enhance the substance and depth of coordination among agencies associated with trade law, both within and outside the United Nations system. Aware of that need, the secretariat had begun to use new approaches to draw upon the work done in other forums, including requesting comments from relevant agencies on draft texts. Secondly, OIOS had recommended that the secretariat should increase the range and breadth of its technical assistance in the field of trade law reform. Accordingly, the secretariat was considering a strategy to work jointly with funding agencies supporting trade-related programmes and to increase contributions to its trust funds, including funding from the private sector.

9. Thirdly, doubts had been expressed as to whether the International Trade Law Branch would be able to maintain the quality and efficiency of its work, in view of the fact that staff resources had remained at their 1968 levels. In its conclusions and recommendations, OIOS said that the implementation of a number of recommendations relating to the Office of Legal Affairs might require additional resources, for which OLA should prepare a detailed justification for review through the appropriate programme and budget review processes. He suggested that the Commission should hold informal consultations on that topic during the second week of the current session, and that the consultations should aiso address recommendation 15 of the OIOS report, referring to the secretariat requirements in the light of the expansion in the number of UNCITRAL Working Groups from three to six.

10. He and his colleagues in the Office of Legal Affairs had come to the conclusion that the only workable options were either to reduce drastically the Commission's current work programme or to increase the resources of its secretariat significantly. In that connection, he noted that the Committee for Programme and Coordination was currently meeting to make recommendations on, among other things, the amount of resources to be allocated to strengthening the UNCITRAL secretariat. Those recommendations were crucial for the deliberations of the Fifth Committee of the General Assembly, which would be making the final recommendations to the Assembly.

11. The strengthening of the secretariat was necessary for several reasons: (i) there was a clear demand from Member States for the Commission to prepare legal standards for a globalized economy in areas where until recently the United Nations had not been active; (ii) there was an increased need for coordination among a growing number of international organizations that formulated rules and standards for international trade; and (iii) the increased need for technical assistance would require particular attention on the part of the Commission as the formulating agency when national Governments considered implementation of international standards in domestic legislation.

12. With regard to the Commission's agenda at the current session, he noted that procedures for amicable, non-adversarial settlement of commercial disputes were being increasingly recognized as an indispensable element for promoting international trade. The Commission had already made a significant contribution to the development of such procedures with the adoption of the UNCITRAL Conciliation Rules in 1980. The adoption of the draft Model Law on International Commercial Conciliation would represent yet another valuable contribution by UNCITRAL to the development of efficient dispute settlement mechanisms in international commercial transactions.

Election of officers

13. **Ms. Toe** (Burkina Faso), speaking on behalf of the Group of African States, nominated Mr. Akam Akam (Cameroon) for the office of Chairman.

14. *Mr. Akam Akam (Cameroon) was elected Chairman by acclamation.*

Adoption of the agenda (A/CN.9/503)

15. *The agenda was adopted.*

16. *In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.*

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/506, A/CN.9/513 and Add. 1-2 and A/CN.9/514)

17. **Mr. Sekolec** (Secretary of the Commission) said that the work of UNCITRAL on the draft Model Law

had attracted attention in many quarters of the world. For example, a recent conference on ecology in London had devoted a session to the draft and had expressed considerable support for it. In Latin America also there had been a great deal of activity in recent years with regard to mediation and conciliation. The draft Model Law had been taken as a model for national laws in a number of countries, such as Paraguay. Other related activities had been taking place in the Balkans; pilot projects had been established for mediation centres; judges were sending parties to conciliation; and training was being offered for mediators and conciliators. Those efforts were being supported by the Southeast European Cooperative Initiative (SECI) and the United Nations Economic Commission for Europe.

18. The European Union, in an effort to put the topic of mediation high on the agenda, had published a green paper in which it recognized the work of the Commission. The Baltic and International Maritime Council (BIMCO) had also included mediation in its dispute settlement method and had taken the UNCITRAL approach as formulated by the Commission's Conciliation Rules.

19. The text about to be finalized would therefore have a significant impact and would be received with a great deal of interest in different parts of the world. The fact that the draft Model Law had been completed in only four sessions was a tribute to the efficiency and expertise of the Working Group.

20. **Mr. Sorieul** (International Trade Law Branch) drew the Commission's attention to the text of the draft Model Law contained in the annex of the report of the Working Group on Arbitration on the work of its thirty-fifth session (A/CN.9/506); the draft guide to its enactment and use (A/CN.9/514); and a compilation of comments by Governments and international organizations (A/CN.9/513 and Add.1 and 2).

21. Informal consultations had been held on article 15 with a view to achieving a more complete text. The secretariat would provide a summary in due course.

22. **The Chairman** invited delegations to make general comments on the text of the draft Model Law.

23. **Mr. Rendón** (Mexico) said that the text had been approved by consensus within the Working Group. Once adopted, the instrument would prove very useful to domestic as well as international conciliation. Not only did it avoid over-regulation, it also accorded high priority to volition.

24. **Mr. Sekolec** (Secretary of the Commission), responding to a procedural question put by **Mr. Shimizu** (Japan), said that the Commission would be advised to consider the text of the draft Guide to Enactment (A/CN.9/514) after the draft Model Law had been finalized.

25. **Mr. Tang** Houzhi (China) expressed strong support for the draft Model Law. Once adopted, it would constitute one of the two pillars of international commercial conciliation alongside the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). Although much of the draft was acceptable to his delegation, for the instrument to be fully effective its enforceability should be strengthened. In addition, mediation and arbitration — two important elements in international commercial conciliation — should be more closely linked.

26. **Mr. Medrek** (Morocco) reiterated his country's position that the draft constituted a legal platform for helping countries to introduce amendments as they adapted to current developments. In that regard, the provisions in the draft gave States wishing to incorporate the law into their domestic law the possibility of adapting and amending it in accordance with their own particular situation. As such, the draft law provided an appropriate legal mechanism for resolving disputes.

27. **Ms. Geth-Flemmich** (Austria) expressed strong support for the draft. Her Government was currently considering introducing new legislation on arbitration and was thus following the work of the Commission with particular interest. The UNCITRAL Model Law on International Commercial Arbitration (1985) had inspired legislation in many countries; her delegation was convinced that the Model Law on International Commercial Conciliation would enjoy similar success. It would also set the necessary standards in an important and rapidly evolving area.

28. **The Chairman**, noting that there were no objections to the proposed title, invited the Commission to proceed to a paragraph-by-paragraph analysis of the draft. He would suggest that it postpone consideration of footnote 1 pending issuance of the relevant document (A/CN.9/XXXV/CRP.3).

Draft article 1. Scope of application and definitions

29. **Mr. Medrek** (Morocco) reiterated his delegation's position that the title of article 1 should be amended to read: "Definitions and scope of application".

30. **Mr. Shimizu** (Japan) said that it could appear from the current article 1, paragraph (1), that enacting States would be required to apply the Model Law directly to international commercial conciliation regardless of applicable law under private international arbitration rules. Since the instrument would constitute a model law rather than a convention, different versions would be incorporated into national legislation, creating a conflict of law situation. It was his own delegation's understanding that article 1 was not, however, intended to replace or exclude the application of existing rules of international law. If the Commission shared that interpretation, it should be reflected in the draft Guide.

31. **Mr. Sekolec** (Secretary of the Commission) said that in accordance with past practice, any ruling from the Commission on Morocco's proposal concerning the title of article 1 would be implemented by a drafting group comprising delegates working in each of the six languages and assisted by professional language revisers. Subsequently, a revised text would be submitted to the Commission for consideration.

32. **The Chairman** said that unless the Commission adopted a definitive wording in a particular instance, the formulation of the titles of articles was generally considered a drafting exercise to be undertaken by the drafting group. The secretariat had taken note of the comment made by the representative of Japan, which essentially related to the draft Guide.

33. **Mr. Kovar** (United States of America), addressing the concern raised by the representative of Japan, said that it was not clear to his delegation in what circumstances a conflict-of-law situation might arise. Presumably, it would be a question of whether some forum law applied. If the issue was to be treated in more detail in the draft guide, the Commission's choice-of-law experts should be allowed sufficient time for careful consideration.

34. **Mr. Shimizu** (Japan) said that different versions of the Model Law would exist at the national level, but that the connecting factor would be that its application would be triggered if the parties to an agreement to conciliate had their places of business in different States. Confusion might thus arise as to which version of the Model Law applied in a particular case, even if the law of the forum governed the Law's effect.

35. **The Chairman** said that the previous speaker's point underlined the importance of incorporating a Model Law without changes.

36. **Mr. Meena** (India) said that India's arbitration and conciliation act was based on the UNCITRAL Model Law on International Commercial Arbitration, with a separate section on conciliation. The act did not in any way differentiate between domestic and international conciliation. The Working Group, for its part, had advised States to maintain two sets of rules governing the settlement of disputes, in order to avoid unnecessary interference with domestic laws. His delegation however wished to question the practicability of such an approach.

37. **The Chairman** said that although the Working Group had discussed the issue extensively, no agreement had been reached. A number of participants had considered that the Model Law should cover only international conciliation, while others had maintained that it should be made equally applicable to domestic and to international conciliation. In order to avoid a situation of two separate bodies of law, a compromise solution had been set out in footnote 1, offering States the option of changing certain provisions if they wished the Law to apply to both types of conciliation. In an analogous situation, Mexico, upon enacting the UNCITRAL Model Law on International Commercial Arbitration, had modified certain provisions to make the Law apply to national as well as international arbitration.

38. He took it that the Commission wished to approve draft paragraph (1) provisionally and to postpone adoption of footnote 1 pending issuance of the relevant document.

39. *It was so decided.*

40. **Mr. Kovar** (United States of America), referring to draft paragraph (2), said that the draft Guide might include a provision to the effect that courts, in interpreting the paragraph, might wish to consider conduct of parties demonstrating their understanding or expectation of being engaged in conciliation.

41. *Draft paragraph 2 was provisionally approved.*

42. **Mr. Markus** (Observer for Switzerland) said that in his view, subparagraph (ii), of draft article 1, paragraph (3) (b), gave a general example of international conciliation of which subparagraph (i) was merely a specific example. Subparagraphs (i) and (ii) should therefore logically be reversed so that the general principle was followed by a specific expression of that principle.

43. **The Chairman** suggested that the question could be referred to the drafting committee.

44. **Mr. Jacquet** (France) said that his delegation was reluctant to support the suggestion made by the observer for Switzerland, as it considered that subparagraphs (i) and (ii) referred to different issues. He urged the Commission to remember that the primary goal of paragraph (3) (b) was not to resolve a conflict of laws, but simply to set out what made conciliation international in character. Subparagraph (i) was the simplest and most objective way of summarizing that international character. Subparagraph (ii) was more complicated, and perhaps also debatable, in that it used wording more commonly associated with resolving a conflict of laws. The delegation therefore favoured retaining the original order of subparagraphs (i) and (ii).

45. **Mr. Morán Bovio** (Spain) said that his delegation had initially been sympathetic to the view of the Observer for Switzerland, but had then found the reasoning put forward by the delegation of France convincing. He considered that the two subparagraphs in question adequately covered the issue of international character, and fully supported the Chairman's suggestion that the matter should be referred to the drafting committee to settle the sequence in which they occurred, particularly since the delegation of France had shown that the matter was perhaps less simple than it seemed at first sight.

46. **The Chairman** said that it was true that what appeared to be a simple suggestion regarding wording could sometimes turn out to be a more complicated problem of interpretation. More exploration and guidance were perhaps warranted.

47. **Mr. Möller** (Observer for Finland) said the agreed with the delegation of France that the order of subparagraphs (i) and (ii) of paragraph (3) (b) should not be reversed. Such a step might have been logical had the primary issue been one of a conflict of laws, but it was not. The provisions had been discussed in depth in the Working Group, so making alterations as a matter of taste rather than on the grounds of compelling reasons was not advisable.

48. **The Chairman** said that he wished to clarify how he saw the situation: the Working Group had discussed that and other issues at great length to produce the draft Model Law before the Commission. Although it was not final, he agreed with the Observer for Finland that changes to the draft needed to be backed up by compelling reasons rather than be simple suggestions. The rules needed to be clear, and he appealed for anyone with questions about such a working method to raise them with him.

49. **Mr. Holtzmann** (United States of America) welcomed the Chairman's statement of his view of the rules, and concurred with them. Thanks to the incisive analysis made by the delegation of France, he saw strong reasons to leave the wording of draft article 1, paragraph (3), as it was. Moreover, the issues were listed in the present draft Model Law in the same order that they were listed in the UNCITRAL Model Law on International Commercial Arbitration. That too had been the result of long discussion, and he saw great advantages in maintaining consistent UNCITRAL practice. He favoured leaving the wording unchanged, but if the matter was referred to the drafting committee, he asked for that committee to consider his observations.

50. *Draft paragraph (3) was provisionally approved.*

51. **The Chairman** asked if there were comments on draft paragraph (4), a provision which also existed in other UNCITRAL instruments, such as the Model Law on Electronic Commerce.

52. *Draft paragraph (4) was provisionally approved.*

53. **The Chairman** asked if there were comments on draft paragraph (5), which allowed parties to "opt in", voluntarily applying the Model Law to conciliation procedures even if the latter were not within the Law's remit or were not international.

54. **Mr. Jacquet** (France) said that the wording of paragraph (5) had been thoroughly discussed, and his observation related not to substance but to form. He thought that the wording corresponded to that in the UNCITRAL Model Law on International Commercial Arbitration which allowed arbitration cases to be considered voluntarily to be international. The present Model Law posed nothing more than a problem of

wording, though at the current stage of debate, issues of wording were significant. In the light of the fact that draft article 1, paragraph (1), already allowed parties to enact the Model Law to apply to domestic as well as international conciliation, he asked if it was advisable to retain draft article 1, paragraph (5), as it would have no relevance whatsoever for those parties.

55. **Mr. Sorieul** (International Trade Law Branch) pointed out that the Commission's discussion of footnote 1 to draft article 1, paragraph (1), should not be pre-empted. Document A/CN.9/XXXV/CRP.3, which had not yet been distributed, would explain that one of the consequences of extending the scope of the Model Law to domestic conciliation would be a change in the wording of paragraph (5). As he remembered it, that change referred to the Model Law applying to commercial conciliation "whenever the parties agreed that it should".

56. *Draft paragraph (5) was provisionally approved.*

57. **The Chairman** asked if there were comments on draft article 1, paragraph (6), which had the opposite effect of paragraph (5), allowing parties to "opt out" of applying the Model Law to conciliation procedures.

58. **Mr. Milassin** (Hungary) said that his delegation had submitted written remarks concerning paragraph (6) which he saw no use in repeating. It was prepared to accept paragraph (6) as it stood, but said that if no changes were made to it, agreement would have to be reached on whether the parties should be able to opt out of the whole of the Model Law, or only a part of it. His delegation favoured a partial opt-out.

59. **Mr. Shimizu** (Japan) said that his delegation found it difficult to interpret paragraph (6) in the light of the existence draft article 3, which affirmed the principle of party autonomy and seemed to make paragraph (6) redundant. Furthermore, draft article 3 listed some provisions from which the parties could not agree to derogate, in other words, a restriction of party autonomy, while paragraph (6) stipulated no such restrictions. It would perhaps be best to delete draft article 1, paragraph (6), particularly as it had no equivalent in Model Law on International Commercial Arbitration, and concern for consistency was not therefore an issue.

60. **The Chairman** said that his recollection from the Working Group's discussions was that paragraph (6) existed to cover the very important issue of the scope of the Model Law, providing an opportunity to decline to apply it. If the Model Law was applied, however, draft article 3 would come into play, as would its restriction on derogations. It reflected the Working Group's desire to ensure that once parties did apply even part of the Model Law, uniformity of interpretation was retained (draft art. 2) and fair and equal treatment was maintained during conciliation (draft art. 7, para. (3)).

61. **Ms. Beleva** (Observer for Bulgaria) said that like the representative of Japan she had wondered about the scope of paragraph (6), bearing in mind that the very foundation of conciliation was autonomy and free will. In the light of the Chairman's explanation, however, she believed that paragraph (6) should be retained.

62. **Mr. Barsy** (Sudan) said that paragraph (6) was too important to delete; however, the Commission might wish to defer that decision until it had concluded its discussion and had a better overview.

63. **The Chairman** said he would take note of the Sudanese proposal but, in the absence of other input, he would take it that the Commission supported the text as drafted by the Working Group.

64. *Draft paragraph (6) was provisionally approved.*

65. **The Chairman** invited the Commission to consider paragraph (7) of article 1.

66. *Draft paragraph (7) was provisionally approved.*

67. **The Chairman** invited the Commission to consider paragraph (8), including its subparagraph (a) and a subparagraph (b) which would permit certain exclusions by States implementing the law.

68. **Mr. Shimizu** (Japan) asked whether subparagraph (a) could be broadly interpreted to include court-annexed procedures by which conciliation took place in Japan.

69. **The Chairman** said that they could be included under paragraph (7) but not paragraph (8), which described cases where the judge or arbitrator himself was involved in the conciliation proceedings.

70. **Mr. Graham** (Mexico) said that the aim of the draft guide to enactment was not to inhibit or prohibit the participation of a judge or arbitrator in the conciliation efforts, but to make it clear that judges or arbitrators were subject to the specific laws governing judges or arbitrators rather than to the Model Law.

71. **Mr. Tang** Houzhi (China) said that although, in the Working Group, China had been in favour of deleting the paragraph, which seemed to impede the participation of judges or arbitrators in settlement proceedings, it had later realized that, on the contrary, the provision actually fostered their participation. His delegation therefore believed that the paragraph should be retained.

72. **Mr. Shimizu** (Japan) enquired about the rationale behind the paragraph and the specific elements which had determined that the Model Law should not apply in such cases.

73. **The Chairman** said that, as the representative of Mexico had indicated, the action that could not be taken by a judge or arbitrator should be determined by the relevant laws of civil procedure in each country. In certain parts of the world, it was perfectly acceptable for the judge or arbitrator to act as conciliator, while in others, it was not. The Model Law deliberately refrained from determining either the legality or the desirability of such a practice.

74. **Mr. Möller** (Observer for Finland) fully agreed with the Chairman about the nature and purpose of the paragraph. Even if it had not been included, the content of the paragraph would be implicit in the Model Law. It was a given that judges and arbitrators could not exceed what was set out in the claims and counterclaims of a case, but the extent of their involvement was very different, depending on the legal system. For the sake of clarity, the inclusion of paragraph (8) was essential.

75. **Mr. García Feraud** (Observer for Ecuador) characterized the issue as "pedagogical". In a number of Latin American countries, such as his own, arbitral proceedings or mediation would be viewed as a preliminary phase prior to the actual conciliation of the parties. That was just one of many variations that could occur in different legal systems.

76. **Mr. Jacquet** (France) expressed full agreement with the interpretations given by the Chairman and the Observer for Ecuador but said that the Model Law could be applied at the request of both parties to an arbitral (but not a court) proceeding, which would constitute an exception under the provisions of article 1, paragraph (5).

77. **The Chairman** said the comment of the representative of France would be taken into consideration in the draft guide to enactment.

78. **Mr. Tang** Houzhi (China) said that the paragraph should be retained as drafted, since it did not bar a judge or arbitrator from attempting to facilitate a settlement. Where such conciliation occurred, the Model Law would simply not be applicable. His understanding of the paragraph was slightly different from that of the Chairman or the representative of France; he believed that the paragraph was closely related to article 16, and he would elaborate further on that point at the appropriate time.

79. **The Chairman** said that paragraph 130 of document A/CN.9/506 contained the text of article 16, which the Working Group had decided to delete. The representative of China could propose that it should be reinstated before the Commission discussed draft article 15.

80. **Mr. Meena** (India) said that his delegation had no difficulty in agreeing to the retention of paragraph (8), whereby an attempt by an arbitrator to facilitate a settlement did not constitute an act of conciliation. The parties were free to reach a compromise at any time during the course of arbitral or court proceedings. An arbitrator or court should not be prevented from acting as facilitator, should the parties opt for a compromise over a court decision on the merits.

81. **Mr. Joko Smart** (Sierra Leone) said that, if a judge acted as conciliator during a court proceeding in order to facilitate a settlement, the parties' acknowledgement that it had been a mistake to come before the court could be incorporated in the judgement and the Model Law would not apply, in accordance with the final sentence of article 1, paragraph (2). Since paragraph (8) clarified and reinforced that point, it would be useful to retain it.

82. **Mr. Barsy** (Sudan) said that his delegation was in favour of retaining the paragraph, particularly with regard to judgements. Indeed, judges' attempts to reconcile the parties were based on domestic civil codes, which generally included conciliation procedures. If the judge brought about a settlement, it could be incorporated in his decision and there would be no problem in applying it.

83. **The Chairman** said that, although some delegations, seemed to construe subparagraph (a) as

permitting a judge to act as conciliator in court proceedings, that was neither the import of the subparagraph nor the intention of the Working Group. Paragraph (8) merely stated that the Model Law was not applicable in certain situations, which left States the latitude to construe it in the context of their domestic law.

84. *Paragraph (8) (a) was provisionally approved.*

85. **The Chairman** noted that no mention had been made of paragraph (8) (b), which could be relevant in labour law or in areas subject to domestic regulation, such as finance, insurance or stock market transactions.

86. **Mr. Rendón** (Mexico) said that the decision made at the previous session to refer to "*panel de conciliadores*" in the Spanish version was reflected in draft article 5, but not in draft articles 1, 7, 8, 9 and 12. He hoped the Drafting Group would make the necessary corrections.

The meeting rose at 12.50 p.m.

United Nations A/CN.9/SR.740

General Assembly

Distr.: General
17 July 2002

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 740th meeting
Held at Headquarters, New York, on Monday, 17 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-43092 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.10 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506, A/CN.9/513 and Add.1-2 and A/CN.9/514)

1. **The Chairman** invited the Committee to resume consideration of the draft UNCITRAL Model Law on International Commercial Conciliation in the version contained in the annex to the report of the Working Group on Arbitration on the work of its thirty-fifth session in Vienna from 19 to 30 November 2001 (A/CN.9/506).

Draft article 2. Interpretation

2. **The Chairman** noted that the text of draft article 2 on interpretation had been inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods and that similar wording appeared in other UNCITRAL model laws.

3. **Mr. Graham** (Mexico) said his delegation wished to emphasize the importance of adopting the text of the draft article as it stood in order to ensure uniformity in the interpretation of the Model Law in various countries.

4. **Mr. Morán Bovio** (Spain) said he agreed with Mexico that the draft article set forth a very important principle that was in keeping with the Commission's other work.

5. *Draft article 2 was provisionally approved.*

Draft article 3. Variation by agreement

6. **Mr. Inoue** (Japan) said that his delegation wished to see draft article 3 on variation by agreement adopted in its current form and could not concur with the proposal made by France (A/CN.9/513) to include a mention of draft article 15, "Enforceability of settlement agreement", among the provisions of the Law which parties could not vary by agreement. Since conciliation depended heavily on the principle of party autonomy, parties should not be deprived of the freedom to accord their settlement a weaker effect than that of a contract or an arbitral award.

7. **Mr. Jacquet** (France), referring to France's written comments on draft articles 3 and 15 (A/CN.9/513), said that his delegation did not see the value of allowing the parties to determine the level of enforceability of their settlement agreement, particularly since in most countries that would run counter to the tendency of national law. Therefore, it was appropriate to mention article 15, whatever its final form might be, as one of the provisions the parties could not derogate from.

8. **The Chairman** suggested to the delegations that had submitted the comments that appeared in A/CN.9/513 and Add. 1 and 2 that they should repeat their arguments orally if they wanted them to be considered in the present debate.

9. **Mr. Markus** (Observer for Switzerland) said that he did understand the French position, since enforcement necessarily involved the mechanisms of the State. Parties could not agree on a greater degree of enforceability of their settlement than the laws of the State permitted. However, it was possible that parties might wish to agree on a lesser degree of enforceability, or conceivably even none. Therefore his delegation did not think that article 15 should be mentioned in draft article 3 as a mandatory exception to variation by agreement. Instead, in the Guide to Enactment it could be explained that the parties could not agree on a higher level of enforcement than that provided by article 15 and by national law, but could agree on a lower level of enforceability.

10. **The Chairman** said that, without wishing to cut off debate, he might suggest that it would be better to discuss France's proposal once the content of draft article 15 had been decided.

11. **Mr. Tang** Houzhi (China) said that without a strong provision on enforceability, the Model Law would lose much of its significance. The parties should not be allowed to agree to reduce or exclude the enforceability of their settlement agreement.

12. **Mr. Kovar** (United States of America) said that his delegation shared Japan's view that party autonomy was at the core of the Model Law. As the Observer for Switzerland had said, it was hard to see why parties could not settle for less than full enforceability. His delegation favoured omitting mention of draft article 15 from draft article 3, but agreed with the Chairman that it would be better to finalize draft article 15 first, and article 7, paragraph (3) as well, before making a

final decision on which articles to mention in draft article 3.

Draft article 4. Commencement of conciliation proceedings

Draft article 5. Number of conciliators

13. **Mr. Tang** Houzhi (China) said that his delegation had no problems with the wording of draft article 4 on commencement of conciliation proceedings, but felt strongly that footnote 3 to the draft article, containing the so-called "article X" on suspension of the limitation period, should be included in the body of the draft articles. Without a suspension of the limitation period during conciliation proceedings, parties might be far more reluctant to resort to conciliation.

14. **The Chairman** said that the decision to put that material in a footnote had been one of the hardest compromises for the Working Group to reach.

15. **Mr. Inoue** (Japan) said that the wording of draft article 4, paragraph (1), stating that conciliation proceedings commenced "on the day on which the parties to the dispute agree to engage in conciliation proceedings", was unclear, because parties might agree in principle to conciliate even before a particular dispute arose. The two cases needed to be distinguished.

16. With regard to draft footnote 3, which indicated that the text of article X was suggested for States that might wish to adopt a provision on the suspension of the limitation period, the word "suggested" was too strong. A more neutral term should be found.

17. **The Chairman** explained that, in respect of draft article 4, the Working Group had been concerned with an agreement to engage in conciliation proceedings after a dispute had arisen, not a general agreement to conciliate, which might have been entered into prior to a dispute.

18. **Mr. García Feraud** (Observer for Ecuador) said that his delegation did not wish to re-open the entire debate, but simply to recall that Ecuador, in its written comments (A/CN.9/513), had argued for the inclusion of draft article X in the main body of the Model Law, rather than as an optional clause. In Ecuador itself, the option would probably be adopted as the norm. The concern was that in some countries, if no particular provision was made for suspension of limitation, the commencement of conciliation might bring about an interruption of the limitation period, which, if conciliation was unsuccessful, would begin to run again from day one.

19. **Mr. Jacquet** (France) said that his delegation saw difficulties with article 4, paragraph (2), according to which a party could assume that its invitation to conciliate was rejected if it received no answer within 30 days. If the parties had no prior conciliation agreement, and one party invited the other to conciliate after a dispute had arisen, the clause raised no problems. If, however, the parties did, for example, have a conciliation clause in their contract, and one party invited the other to conciliate, the second party would have to accept or be in breach of contract. His concern was that the paragraph might be interpreted as providing that party a loophole to escape its contractual obligation. Accordingly, he proposed that the sentence should be preceded by the words, "In the event that the parties have not concluded a conciliation agreement, ...".

20. **The Chairman** said that, as the Working Group understood it, the provisions of paragraph (2) would apply whether or not there was a prior conciliation agreement. In either case, after 30 days the first party could consider the invitation to conciliate rejected. Only the consequences of that rejection would differ, and they were outside the scope of the Model Law.

21. **Mr. Holtzmann** (United States of America) said draft article 4, paragraph (2), placed in question the obligation of a party which stated its agreement to conciliate and then failed to do so. It must be recognized that even if one party agreed to conciliate, any attempt to enforce the agreement would be subject to draft article 12 (d), which would allow the other party simply to terminate the proceedings by resorting to the voluntary concept which lay at the heart of conciliation. Draft article 4, paragraph (2), reflected that fact. It was also consistent with current practice, because according to article 2 of the UNCITRAL Conciliation Rules, conciliation began when one party issued an invitation and the other accepted it. His delegation therefore had no difficulty with paragraph (2).

22. Referring to the statement by the representative of Japan, he said that draft article 4, paragraph (1), if read literally, could be taken to mean that conciliation would begin on the date of the original contract,

however long ago that was, if the contract contained a conciliation clause. However, a commonsense reading of that paragraph, and his own, was that it referred to the date on which the dispute arose and the parties agreed to conciliate. He therefore agreed with the Secretary that draft article 4, paragraph (1), warranted some redrafting.

23. Concerning the additional draft article X, he had no objection to including a provision to allow States to opt for suspending the limitation period, but the addition seemed to be in the wrong place. There were certain risks attached to the provision, and States should be made fully aware of them. Because conciliation was by definition informal and flexible, it was difficult to define what a conciliation procedure was, and when it began and ended.

24. The Working Group had correctly taken the approach that conciliation might be pursued in a variety of ways. A State which adopted a provision along the lines of draft article X must be aware of the need for precision about the beginning and end of the conciliation procedure, because if a dispute arose towards the end of the prescription period, the decision whether conciliation had begun or ended might determine the outcome of the dispute, one party maintaining that the claim remained alive, the other that it was dead. The resulting uncertainty would engender litigation, and in turn litigation would undermine the reputation of the conciliation process.

25. The parties themselves would have no need of draft article X: a party aware that the prescription period was about to expire would be free to initiate an arbitration procedure, or proceedings in a national court, to protect its rights. States, however, should be advised of the practical effect of adopting the provision, in case their legislatures did not realize it. He suggested that could best be done by moving draft article X to the Guide.

26. **The Chairman** said the decision to place draft article X as a footnote had been a compromise solution devised by the Working Group; some delegations had been anxious to include it in the body of the text.

27. **Mr. Marsh** (United Kingdom) agreed with the representative of the United States about the need for clarity in defining the commencement of the conciliation proceedings. It was not just a matter of determining when a suspension of the limitation period began, but also of the admissibility of evidence. Draft article 11, paragraph (1) (c), referred to statements or admissions made by a party "in the course of the conciliation proceedings", which he took to be a reference back to draft article 4, paragraph (1). Both provisions had to be clarified. He was concerned to know when the parties could be said to "agree" to conciliate, according to draft article 4, paragraph (1). In United Kingdom practice it would be difficult to pin down a date, because the initial agreement would be informal and merely a matter of principle, the details being fleshed out later. Would the agreement take shape at the initial stage, or when the details were decided upon?

28. **Mr. Sekolec** (Secretary of the Commission) said the earlier versions of draft article 4, paragraph (1), had contained more detail on the timing of the agreement. However, the Working Group had decided it was prudent not to attempt a definition. A unified rule on the timing would not be achievable, because of the variety of solutions in national law in matters of contract. For that very reason, the Convention on Contracts for the International Sale of Goods did not include such a definition.

29. As for draft article 4, paragraph (2), he suggested that a text could be incorporated into the Guide to clarify the kind of situation which might arise if there was a pre-existing conciliation agreement and one of the parties failed to respond to an invitation to conciliate. Draft article 4, paragraph (2), stated that silence could be treated as a rejection of the invitation, but did not define the consequences of the rejection. Depending on the national law in question and the nature of the conciliation agreement, they might include loss of goodwill and liability for damages or even for court costs, if the result was litigation. The consequences of a rejection could even be referred to in the text of the article.

30. **Mr. Möller** (Observer for Finland) thought it would be inadvisable to define in draft article 4, paragraph (1), exactly when the agreement to conciliate was reached. He could accept both paragraphs of draft article 4 as they were; there was no need for the additional language for paragraph (2) suggested by the delegation of France, provided sufficient clarification was given in the Guide. As for draft article X, he was not in favour of placing it in the body of the text. Introducing complex arrangements for suspending the limitation period would make the Model Law less attractive to Governments.

31. **Mr. Inoue** (Japan) said draft article 4 dealt only with the point in time at which conciliation proceedings began. Because the commencement had legal consequences, it was also necessary to have a procedure for termination, as provided in draft article 12. He was interested in the suggestion by the delegation of France that a distinction could be drawn between contracts containing a conciliation clause and others which did not. The commencement of conciliation proceedings could be defined as the point in time when one party invited the other to conciliate, on the basis of a prior agreement. The other party would then be required to have recourse to draft article 12 in order to terminate the proceedings.

32. **Mr. Zanker** (Observer for Australia) said that if paragraph (1) was ambiguous, it should be reviewed by the drafting group. He interpreted it to refer to agreements made in the context of particular disputes, not those incorporated in a prior contract. The arrangements for terminating proceedings were spelled out in draft article 12. If no other circumstances were envisaged than those in draft article 12, they could perhaps be covered in draft article 10.

33. It was difficult to define the timing of conciliation proceedings without being overly prescriptive. The prospect of litigation in which the duration of the limitation period was itself in dispute would not make the Model Law any more attractive to States. He was not in favour of including draft article X in the body of the text.

34. **Ms. Manglayankul** (Thailand), commenting on draft article X, agreed with the representative of the United States. The appeal of conciliation lay in its flexibility and the fact that it was voluntary. Including a provision such as draft article X in the text of the Model Law would confer on the procedure something of a compulsory character, and create other difficulties for jurisdictions such as hers in which the limitation period was already defined in civil and commercial law. It would also have an impact on contractual relations. If a majority in the Commission wished to include draft article X, she would prefer to place it in the Guide rather than as a footnote. If that was done, she would have no difficulty with either paragraph of draft article 4.

35. **Mr. García Feraud** (Observer for Ecuador) said his country was anxious to see the draft Model Law completed as soon as possible. The explanation given by the acting Chairman made clear that the placing of draft article X had been a compromise solution. In any case, the essence of the draft Model Law was that conciliation was voluntary, so an optional provision for suspending the limitation period, not included in the body of the text, would be appropriate. There might indeed be a risk of parties exploiting it by seeking to prolong proceedings, or accepting an offer to conciliate but failing to proceed; however, it was no less risky to have no provision along the lines of draft article X.

The meeting was suspended at 4.35 p.m. and resumed at 5.15 p.m.

36. **The Chairman** said that, following consultations with various delegations, a consensus had emerged to retain the Working Group's proposal to include draft article X in a footnote as a suggested option, and to provide guidance to States on making their decision in the corresponding section of the Guide to Enactment. Any remaining doubts concerning the interpretation of draft article 4 should also be clarified in the Guide.

37. **Mr. Tang** Houzhi (China) said that even though his delegation could accept the current formulation of draft article 4, the Model Law would have been more attractive to States if draft article X had been included in the main text. There were objective reasons for its inclusion, and it had nothing to do with compatibility with Chinese law. The purpose of determining the commencement and termination of conciliation proceedings (in draft articles 4 and 12, respectively), was to indicate clearly the basis for suspending the limitation period. Without the inclusion of draft article X, the purpose of the provisions of draft articles 4 and 12 was unclear.

38. **The Chairman** explained that discussions would continue in the drafting group with a view to improving the notes in the Guide on the advantages and disadvantages of adopting draft article X.

39. *Draft articles 4 and 5 were provisionally approved.*

Draft article 6. Appointment of conciliators

40. **Mr. Marsh** (United Kingdom) said that the wording of article 6, paragraph (2), assumed that there were only two parties to the dispute, which would prevent it from being applied to disputes involving several parties. The drafting group should consider how to resolve that problem.

41. **Mr. Sekolec** (Secretary of the Commission) said that since the same problem arose in other paragraphs, the point made by the representative of the United Kingdom seemed to be more than a simple drafting question. There would need to be a comprehensive solution, either by including a catch-all provision for disputes involving more than two parties, or by redrafting each article where the problem arose.

42. **Mr. Morán Bovio** (Spain) said that situations in which there were more than two parties to a dispute were quite common, for instance when disputes arose between more than one provider of the same product and a manufacturer over the price of goods or sequencing of delivery. He suggested the insertion of a catch-all provision at the end of the main text, such as "whenever the text refers to two parties, it could equally apply to several parties". That amendment would not entail extensive changes to the text.

43. **Mr. Sekolec** (Secretary of the Commission) said that draft article 6 did not concern the number of parties, but the number of conciliators. Paragraphs (1), (2) and (3) should be seen as neutral as to whether the dispute involved two or several parties. The drafting group should endeavour to find a way to express the idea that paragraph (2), for instance, concerned the appointment of two conciliators, either by two or by several parties.

44. **Mr. Zanker** (Observer for Australia) agreed that the point raised by the representative of the United Kingdom was more than just a drafting question. The focus of draft article 6 should be on the rights of the parties. He acknowledged that paragraph 1 was neutral, but in cases involving more than one conciliator, the provisions should focus on what the parties wanted, rather than on the number of conciliators. It should be considered whether a maximum limit of three conciliators should be established for cases involving a panel.

45. **Mr. Tang** Houzhi (China) said that draft articles 5 and 6 presented no difficulties for his delegation. The provisions of draft article 5 did not conflict with those of draft article 6, paragraph (3), pursuant to which each party should appoint one conciliator in cases for which the composition of a panel was requested. However, if there were three parties to a conflict, one of which appointed a conciliator and two agreed to appoint one conciliator between them, the provisions of paragraph (3) would not apply. While his country had no experience of such cases in the area of conciliation, there were arbitration cases in which several parties constituted either the claimant or the respondent. In those circumstances, the claimant and the respondent, respectively, were each entitled to appoint a single arbitrator.

46. **Mr. Sekolec** (Secretary of the Commission) said that one of the principles on which article 4 of the UNCITRAL Conciliation Rules was based was that the appointment of conciliators depended entirely on the parties to a dispute. The same philosophy was reflected in article 6 of the draft Model Law. The problem presented by paragraphs (2) and (3) of that article with regard to cases involving more than two parties could be resolved by providing for the parties to "endeavour to reach agreement on the number of conciliators and the manner of appointing them".

47. **The Chairman** proposed that the solution suggested by the Secretary of the Commission should be approved. If the parties failed even to agree on the number of conciliators and the manner of appointing them, there could be no conciliation at all.

48. **Mr. Getty** (United States of America) said, with regard to draft article 6, paragraph (6), that while his delegation would have preferred a reference to "conflict of interest", it did not see a need to amend the current text. Nevertheless, it remained concerned that the application of remedies could be hindered by the provisions of the article. If a conciliator failed to disclose a conflict of interest, with the exception of obviously intentional fraud, the corresponding settlement agreement should still be allowed to take effect. Sometimes, parties deliberately chose a conciliator with particular expertise in a given area, meaning that he or she could not be totally impartial. That issue could be explained in the Guide to Enactment.

49. **The Chairman** expressed concern with the suggestion made by the representative of the United States of America, a discussion of which had already been held in the Working Group. However, an explanation in the Guide that the failure to disclose a conflict of interest should not itself annul the conciliation result would not carry sufficient weight in some legal systems. In Mexico, for instance, a judge could still decide to annul a settlement under such circumstances. Members should give serious thought to the matter before the next meeting.

The meeting rose at 6 p.m.

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United Nations A/CN.9/SR.741

General Assembly

Distr.: General
17 July 2002

Original: English

United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 741st meeting
Held at Headquarters, New York, on Tuesday, 18 June 2002, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

Election of officers (*continued*)

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

02-43162 (E)

In the absence of Mr. Akam Akam (Cameroon), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 10.15 a.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*) (A/CN.9/506; A/CN.9/513 and Add.1-2 and A/CN.9/514)

Draft article 6. Appointment of conciliators (*continued*)

1. **The Chairman** invited the Secretary to read the suggested revisions to article 6 that the drafting group had been requested to prepare in order to cover the possibility of multi-party conciliation.

2. **Mr. Sekolec** (Secretary of the Commission) said that the drafting group had prepared two alternative formulations for the Commission's consideration, each with two variants.

3. The first alternative involved retaining the original paragraph (1) and replacing paragraphs (2) and (3) with the following text:

> "In conciliation proceedings with two or more conciliators, the parties shall endeavour to reach agreement on either a joint appointment of the conciliators or on [*first variant*: the procedure for the appointment of the conciliators] / [*second variant*: the way in which the parties will appoint the conciliators]."

4. The second alternative involved replacing all three paragraphs with the following new paragraph:

> "The parties shall endeavour to reach agreement on either a joint appointment of the conciliator or conciliators or on: [*first variant*: the procedure for the appointment of the conciliator or conciliators] / [*second variant*: the way in which the parties will appoint the conciliator or conciliators].

5. **Mr. Morán Bovio** (Spain) expressed support for the first alternative and first variant, which appeared to reflect the concerns raised by the representative of the United Kingdom at the previous meeting. The second variant was too vague.

6. **Mr. Holtzmann** (United States of America) joined with the previous speaker in expressing support for the first alternative, which — on first reading — appeared to allow greater flexibility. The reference to "two or more conciliators" was particularly welcome, since the assumption was all too often made that there should always be an odd number of conciliators. The word "joint" should, however, be deleted, since it gave the impression that mutual agreement was necessary for the appointment of each conciliator. Each party might instead prefer to appoint its own conciliator, regardless of the other party's approval. His delegation could not support the second alternative since it did not allow for the possibility of two conciliators, and since use of the plural form ("the parties") implied that joint agreement was necessary.

7. **Mr. Marsh** (United Kingdom), also giving his preliminary reaction to the suggested revisions, said that the first alternative seemed most acceptable. It was his delegation's view, however, that the language in the new paragraph (2) should be brought in line with paragraph (1) to refer in each case to agreement on the name of the conciliator or conciliators, not merely to their appointment.

8. **Mr. Tang** Houzhi (China) said that he was also more in favour of the first alternative and first variant. However, it was not clear from the proposed text whether there would always be one conciliator for each party, regardless of the number of parties. In paragraph (5), the words "or third conciliator" should be deleted since there was no such concept.

9. **Mr. Markus** (Observer for Switzerland) joined fully with the representatives of Spain and the United States of America. In the draft guide, the very sound procedure described in the current paragraph (2) could be mentioned as one important method for settling disputes.

10. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) said that his delegation also favoured the first alternative and first variation, which offered greater flexibility. It also supported deletion of the word "joint" and the revision proposed by the representative of the United Kingdom.

11. **Mr. García Feraud** (Observer for Ecuador) expressed strong support for the first alternative and first variant, which covered many situations not dealt with in previous texts. He also favoured deletion of the word "joint". In addition, it should be made clear that

an agreement between the parties could be constituted by more than one document, whether simultaneously or successively submitted. Deletion of paragraph (1) might also be considered.

12. **Mr. Möller** (Observer for Finland), welcoming the first alternative and first variant, said that he could also fully support deletion of the word "joint" and the suggestion made by the Observer for Switzerland. He was not, however, convinced by the need to bring the language in the new paragraph (2) in line with paragraph (1) as proposed by the representative of the United Kingdom. The matter should be left to the drafting group.

13. **Mr. Zanker** (Observer for Australia) said that the concern raised by the representative of the United Kingdom might best be met by modifying paragraph (1) — replacing the word "name" with the words "procedure for appointment" — and reformulating the first proposed alternative, first variant thus: "In conciliation proceedings, the parties shall endeavour to reach agreement on the procedure for appointment of the conciliator or conciliators".

14. **Mr. Meena** (India) said that his delegation supported the first alternative, first variant, and deletion of the word "joint".

15. **Mr. Graham** (Mexico) said that his delegation was also prepared to support that alternative and variant, and would not object to deletion of the word "joint". It fully supported deletion of paragraph (3), which applied more to arbitration.

16. **Mr. Jacquet** (France) said that it would be reasonable either to retain paragraph (2) or to modify it so that it would apply to instances in which there were two or more conciliators and more than two parties involved in a dispute. The text of paragraph (2) applied to a situation which frequently occurred and would therefore prove useful.

17. France supported the Secretary's proposal and agreed with the United States view that the word "joint" should be deleted to avoid an excessively restrictive provision. If necessary the text could be slightly modified to include cases in which the parties themselves appointed conciliators, or in the event that a third conciliator were to be appointed. The current text gave the impression that there were two situations which were mutually exclusive: that either the parties would come to an agreement on the appointment of conciliators, or that the parties would agree on a procedure for the appointment of conciliators. In his opinion, both possibilities were viable.

18. **Mr. Slate** (Observer for the American Arbitration Association) said that he supported the version of paragraph (2) as presented by the Secretary, and believed that the word "joint" should be deleted.

19. **Mr. Morán Bovio** (Spain) said that his delegation supported the proposal made by the Observer for Australia on paragraph (1), and that, in an attempt to accommodate the United Kingdom proposal, it might be necessary to study the content of paragraphs (1) and (3) in terms of their similarities. His delegation was still weighing the advantages and disadvantages of keeping paragraph (2). He believed that the representative of France might be correct in his arguments in favour of retaining paragraph (2). It was also necessary to consider the issue of multi-party conciliation, as raised by the United Kingdom, taking into consideration the diversity and varying expertise of conciliators.

20. **Mr. Sillapamahabundit** (Thailand) said that his delegation wished to join the majority view in support of the first alternative; it also favoured the inclusion of provisions applying to instances involving two or more conciliators, as presented in the draft Guide to Enactment.

21. **Mr. Zanker** (Observer for Australia) said that he wondered whether the concerns expressed by Finland, France, Spain and Switzerland with regard to paragraph (2) could not be addressed by a statement, within the text, that Parties had the entitlement, but were not bound, to nominate a conciliator. In the case of multi-party conciliation it was conceivable that a number of parties with a common interest might be served by a single conciliator acting on their behalf. Similarly, there might be cases when each party might prefer having its own conciliator.

22. **Mr. Barsy** (Sudan) said that the Secretary's proposed first alternative adequately covered paragraphs (2) and (3). His delegation supported the deletion of the word "joint", and suggested that it would be fitting to add the following modification to the proposal made by the Secretary: "... the parties shall endeavour to reach an agreement either on a joint appointment of a conciliator or conciliators, or on the procedure of (sic) the appointment of one conciliator or conciliators." That alternative would cover agreement

on proceedings envisaged under paragraph (1). With regard to the concerns expressed by the United States, he believed that paragraph (5) was clear and adequately covered the situation in question.

23. **Mr. Shimizu** (Japan) said his delegation was flexible, but agreed with the view that the new proposals might imply a change in policy. Draft article 6 was intended to apply as a default rule in cases where parties could not reach agreement. He believed it might be wise to make a decision on policy before continuing the drafting exercise.

24. **Mr. Sekolec** (Secretary of the Commission) said that the scenario in which each party appointed its own conciliator or conciliators was not comparable to the situation existing in arbitration where a party had an independent right to appoint its own conciliator. It must be implied that such a conciliator had to be approved and accepted by the other party. That approximated the situation wherein both parties accepted both conciliators, even though the procedure for such appointment was that each party would individually appoint its own. Therefore, the distinction between the joint appointment of two conciliators and the case where each party appointed a conciliator was not very clear.

25. Paragraph (2) had earlier been criticized on the grounds that it allowed one party to impose its choice of conciliator on another party, but that was not actually the case.

26. **The Chairman** said it was clear from the discussion that there was much support for the first alternative proposed by the Secretary of the Commission. Within that alternative, there seemed to be a preference for the first variant. It was also clear that the word "joint" should be deleted.

27. He believed it might be timely to suspend the meeting in order for consultations to be held on new wording that would encompass the points made on various aspects of draft article 6.

The meeting was suspended at 11.25 a.m. and resumed at 12.25 p.m.

28. **The Chairman** announced that the Commission had adopted the first alternative and the wording of the first variant proposed by the Secretary. The word "joint" would be deleted and the drafting group would have to amalgamate draft paragraphs (1) and (2). Concerns about conciliation proceedings with two or more conciliators would be dealt with in the draft Guide to Enactment. The drafting group would submit a text to the Commission by the next day.

29. **The Chairman** drew attention, with regard to paragraph (6), to the United States view that failure to disclose circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence should not systematically result in the nullification of a settlement agreement.

30. **Mr. Marsh** (United Kingdom) said that the paragraph should specify that a conciliator could not be held responsible for circumstances of which he or she was unaware.

31. **Mr. Jacquet** (France) opposed making any changes to the text of paragraph (6) and disagreed with the United States proposal to eliminate consequences where a conciliator had no knowledge of a circumstance that should have been disclosed. For one thing, discussion of consequences in the draft Guide to Enactment was pointless when the Model Law made no reference to them. Moreover, failure to fulfil an obligation should entail consequences whether or not that was explicitly stated in the text. Excessive leniency could be frowned upon in legal circles, where the Model Law was likely to be widely disseminated. In short, he hoped that the United States proposal would not be adopted.

32. **Mr. Möller** (Observer for Finland) supported the remarks made by the representative of France. He was also reluctant to accept the United Kingdom proposal, since it would require altering a formulation taken from the UNCITRAL Model Law on International Commercial Arbitration, and, in any case it was self-evident that a conciliator could not be held liable for a situation of which he himself was unaware.

33. **Mr. Getty** (United States of America) said that there had been a misunderstanding. The issue was not whether or not there should be consequences for failure to fulfil an obligation, which was a matter of ethics, but rather whether or not the articulation of a specific ground could be interpreted as a basis for nullifying a settlement agreement that would not otherwise be nullified under normal contract law. His delegation believed that conciliators were legally and ethically obligated to disclose any circumstance that compromised their impartiality or independence; however, they should not be held liable for inadvertent technical failures to do so.

34. **Mr. Sekolec** (Secretary of the Commission) said that the Working Group had decided to incorporate the United States view by indicating in the draft Guide that paragraph (6) was not intended to add a new ground for the setting aside of a settlement agreement beyond those already contained in a State's domestic contract law. The Working Group had deliberately refrained from attempting to make any changes or additions to existing contract law, since disclosure could have a different effect under the contract law of different legal systems.

35. **Mr. Morán Bovio** (Spain) supported the Secretary's proposal to retain the paragraph as drafted and provide an explanation in the draft Guide to Enactment, which would allay the concerns expressed by the United States, French and Finnish delegations and also take the United Kingdom proposal into account.

36. **The Chairman** said that no changes would be made to the text of paragraph (6) but that an explanation would be provided in the draft Guide to Enactment.

37. *It was so decided.*

Draft article 7. Conduct of conciliation

38. *Paragraphs (1) and (2) of draft article 7 were provisionally approved.*

39. **Mr. Getty** (United States of America), referring to draft paragraph (3), said that his delegation and others were of the view that the paragraph raised the possibility of the conciliation being set aside. The unanimous sentiment in the dispute resolution section of the American Bar Association had been that the paragraph could have dangerous consequences if misunderstood. Although the Commission had decided in Vienna that paragraph (3) would refer to the conduct of the proceeding only, it could have a broader interpretation in the United States of America and other countries, where a subsequent determination that the settlement agreement was unfair could imply that the conduct of the proceeding had also been unfair and thereby constitute grounds to set aside the conciliation. Thus, it would be better if the issue were decided by the contract law of the local jurisdiction.

40. His delegation preferred to see the paragraph deleted in its entirety or, if that was not acceptable to the Commission, at least to have the mandatory provisions of the paragraph removed to allow for a more flexible interpretation by agreement of the parties. The opening phrase "In any case" should also be deleted and there should be a clear statement in the draft Guide to Enactment that paragraph (3) did not seek to create a new cause of action to challenge the conciliation, that any challenge would be made in accordance with existing contract law and that the conduct, not the result, of the proceedings must be fair (since the result would almost always be subjective in the eyes of the parties).

41. **The Chairman** asked for reactions to the argument put forward by the delegation of the United States.

42. **Mr. Jacquet** (France) said that draft article 7, paragraph (3), like the other articles of the draft Model Law, had been discussed at great length by the Working Group. His delegation was disappointed that paragraph (3) had already marked a dilution of the obligation to maintain fairness expressed by the equivalent provisions in the UNCITRAL Model Law on International Commercial Arbitration, but nevertheless supported the inclusion of the paragraph as a fundamental component of the present draft Model Law from which no derogation should be possible. It could see no use in an agreement that allowed conciliators to forego being even-handed.

43. Again, it opposed with regret the suggestion made by the delegation of the United States that the phrase "in any case" at the beginning of paragraph (3) should be deleted, on the grounds that it followed on from the previous paragraph, which emphasized the number of ways in which conciliation could be conducted. The effect of "in any case" was to stress that whatever the variety of methods available, the method selected had to be governed by the principle of fairness.

44. **Ms. Renfors** (Sweden) echoed the view of the delegation of France: she understood the concerns of the United States delegation, but did not wish to see paragraph (3) deleted. She interpreted that paragraph's provisions as referring not to the conduct of the conciliation procedure, but to its result, and with that interpretation it would also not be advisable to delete the reference to draft article 7, paragraph (3), in draft article 3, as that would leave the parties free to agree to a derogation. It was important for the draft Model Law to include a provision referring to fair conduct of the

conciliation, particularly if the forthcoming discussion of draft article 15 resulted in the conciliation procedure being made enforceable in some way. She had no objection to the United States proposal to delete the phrase "in any case" at the beginning of paragraph (3), though she did not see clearly how that could help to address that delegation's objections.

45. **Mr. Möller** (Observer for Finland) echoed the views of the delegations of France and Sweden, considering that paragraph (3) was a necessary component of the draft Model Law and that it applied to the conduct, not the result, of the conciliation procedure. Moreover, deleting the phrase "in any case" was counterproductive: he could not see why the parties should be able to agree that the conciliator should not be bound to maintain fair treatment or take account of the circumstances of the case. He favoured an amendment to meet the concerns of the United States delegation if necessary, but not outright deletion.

46. **Mr. Tang** Houzhi (China) echoed the views of the delegations which had not favoured the proposal of the United States delegation. Firstly, paragraph (3) enshrined a fundamental principle for conciliators. Secondly, when a court came to interpret article 15 of the Model Law, it would not be able to intervene in conciliation procedures in the same way in which it could intervene in arbitration procedures. In the case of arbitration, a court could decide if there had been any shortcomings in a procedure, and could set aside an arbitration award as a result. In the case of conciliation, there was no such option for a court to set aside a settlement. Arbitration decisions were made by an arbitrator, while conciliation decisions were made not by a conciliator, but by the parties themselves. In the light of the fact that the present draft Model Law did not have court-related provisions comparable to those of the Model Law on International Commercial Arbitration, paragraph (3) was entirely necessary and appropriate.

47. **Mr. Morán Bovio** (Spain) said that the issue raised by the United States delegation was one which had long been a focus of attention for the Working Group on Arbitration, as demonstrated by paragraphs 70 to 74 of the report on the work of its thirty-fifth session (A/CN.9/506), held in Vienna in November 2001. The wording of the draft Model Law had been the result of a consensus at that session. That history to the matter showed that it was probably one of the most sensitive in the draft Model Law. On the one hand, the need for conciliators to be fair with the parties had to be emphasized. On the other hand, as the United States delegation had pointed out, including that call for fairness in the draft Model Law left it open to challenge on the grounds that a conciliation procedure might not have been fair. The significance of the issue was further highlighted by draft article 3 of the Model Law, which prevented the parties from agreeing to derogate from that principle of fairness, and the ban on derogation was itself proof that fair treatment was regarded as a cornerstone of conciliation.

48. The principle of fair treatment could even be considered a non-negotiable part of the draft Model Law, as diluting it could jeopardize its future success and acceptance by legal and judicial authorities. While his delegation was strongly in favour of retaining draft article 7, paragraph (3), for all the reasons he had explained, the concerns voiced by the United States delegation over the practical application of that paragraph might be met by making it clear, in the body of that paragraph, that fair treatment was required "during the course of the conciliation procedure". Although when read in its entirety, paragraph by paragraph, draft article 7 implied that understanding in any case, more explicit wording might be advisable. That might prevent a situation in which a settlement agreement reached by conciliation was challenged because, for example, notification arrangements were not the same for all the parties involved in the procedure.

49. **Mr. Getty** (United States of America) thanked the Commission for its discussion of an issue which the United States delegation had felt obliged to raise because it was causing a problem. That problem had arisen from a misunderstanding of the Working Group's original intention: that the requirement for fairness pertained to the conduct of the conciliation, and not to its result, whose fairness would always be open to debate. The United States delegation would be happy with a clear statement in the draft Guide to Enactment and Use of the UNCITRAL Model Law on International Commercial Conciliation that the requirement applied to the conciliation procedure, not to the settlement agreement resulting from that procedure, and that it did not vary from existing jurisdictional contract law.

50. **The Chairman**, in the absence of any objections, summarized the outcome of the debate as follows: Draft article 7, paragraph (3) would be left unchanged,

as would the reference to it in draft article 3. However, the draft Guide would indicate clearly that article 7, paragraph (3) did not refer to the settlement agreement. That was logical, as the conciliator had no control over what the parties agreed between themselves. In addition, it would be made clear that, the simple fact of the conciliator failing to comply with the obligations placed on him by article 7, paragraph (3), would not provide new and independent grounds, over and above those of existing contract law, to set aside a settlement agreement.

51. *It was so decided.*

Election of officers (*continued*)

52. **Mr. Cachapuz de Medeiros** (Brazil), speaking on behalf of the Group of Latin American and Caribbean States nominated Mr. Guillermo Reyes (Colombia) for the office of Vice-Chairman.

53. *Mr. Reyes (Colombia) was elected Vice-Chairman by acclamation.*

54. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran), speaking on behalf of the Group of Asian States, nominated Ms. Vilawan Mangklatanakul (Thailand) for the office of Vice-Chairman.

55. *Ms. Mangklatanakul (Thailand) was elected Vice-Chairman by acclamation.*

The meeting rose at 1 p.m.